NATHAN RAJANDRAN v. PP

COURT OF APPEAL, PUTRAJAYA
SURAYA OTHMAN JCA
ABU BAKAR JAIS JCA
SEE MEE CHUN JCA
[CRIMINAL APPEAL NO: W-07-62-06-2021]
29 NOVEMBER 2021

Abstract – *The offence under s. 124K of the Penal Code, notwithstanding its inclusion in the First Schedule to the Security Offences (Special Measures) Act 2012 ('SOSMA'), does not ipso facto render it as falling within the ambit of SOSMA. There exists an ambiguity whether Parliament had intended the section to be categorised as a security offence. The object and purpose of SOSMA has always been to combat terrorism and therefore s. 124K of Penal Code (herein relating to sabotage of water services) does not fall under or within the ambit of SOSMA.*

CONSTITUTIONAL LAW: *Legislation – Constitutionality – Application seeking order that offence under s. 124K of Penal Code does not fall within ambit of Security Offences (Special Measures) Act 2012 ('SOSMA') – Whether s. 124K intended to be categorised as security offence – Whether s. 13 of SOSMA applicable – Whether court has power to grant bail under s. 388 of Criminal Procedure Code ('CPC') – Whether applicant met conditions under proviso to s. 388(1) of CPC*

The applicant, *via* the notice of motion, sought his release on bail pending the on-going criminal proceedings against him. The applicant, amongst others, sought an order that the offence under s. 124K of the Penal Code does not fall under the Security Offences (Special Measures) Act 2012 ('SOSMA') and that the court has the power to grant bail under s. 388 of the Criminal Procedure Code ('CPC').

Held (dismissing applicant's application)
Per See Mee Chun JCA delivering the judgment of the court:

(1) Section 2 of the SOSMA prescribes its application to 'security offences' which as per s. 3 'means the offences specified in the First Schedule'. The offence under s. 124K of the Penal Code, being an offence under Chapter VI, is an offence specified in the First Schedule. However, this does not *ipso facto* render s. 124K of the Penal Code as falling within the ambit of SOSMA. SOSMA was enacted pursuant to art. 149(1)(a), (b), (d) and (f) of the Federal Constitution ('FC'). These pertained to actions to cause citizens to fear organised violence against persons, excite disaffection, to procure the alteration of law and prejudicial to public order or security. However, art. 149(1)(e) was not recited in the preamble to SOSMA. (paras 7 & 10)

(2) The mere presence of s. 124K of the Penal Code in the First Schedule to SOSMA must be looked at in the overall scheme of the purpose and object of SOSMA, to combat terrorism. In *PP v. Khairuddin Abu Hassan & Anor*, the court found that the offence created by s. 124L of the Penal Code involved an action which fell under art. 149(1)(e) and, as it had been excluded in the preamble, there was ambiguity whether Parliament had intended to categorise an offence under s. 124L of the Penal Code as a security offence. In the present case, s. 124K of the Penal Code, was related to sabotage of water services which is an essential service defined in s. 130A(d)(a) of the Penal Code. It was an action which fell under art. 149(1)(e) of the FC 'which is prejudicial to the maintenance of the functioning of any supply or service to …'. This had been excluded in the preamble. It followed that there was the same ambiguity as to whether s. 124K is intended to be categorised as a security offence notwithstanding its inclusion in the First Schedule to SOSMA. Thus, s. 124K of the Penal Code does not fall within the ambit of SOSMA. Therefore, s. 13 of the SOSMA does not apply and it did not behove on the court to make any findings on its constitutionality or otherwise. (paras 11-15)

(3) Section 388 of the CPC would apply in determining whether bail ought to be granted. The proviso to s. 388(1) of the CPC states that bail may be granted to any person under 16 years, woman or sick or infirm person. The applicant may be allowed bail if he was 'sick or infirm' as he did not fall within the other criteria under the section. However, none of the reasons put forth pointed towards that. Therefore, the applicant had not met the conditions for bail to be granted and the court was constrained to dismiss his application. (paras 15, 19 & 21)

Case(s) referred to:
PP v. Dato' Balwant Singh [2002] 4 CLJ 155 HC ***(dist)***
PP v. Khairuddin Abu Hassan & Anor [2017] 4 CLJ 701 CA ***(foll)***
PP v. Yazid Sufaat & Ors [2014] 2 CLJ 670 CA ***(dist)***
Raman Shunmugham lwn. PP [2020] 2 CLJ 818 CA ***(dist)***
Tamil Selven Letchumenan v. PP [2019] 1 LNS 1542 CA ***(dist)***

Legislation referred to:
Criminal Procedure Code, s. 388(1)
Federal Constitution, art. 149(1)(a), (b), (d), (e), (f)
Penal Code, ss. 124K, 124L, 130A(d)(a), (h)(a)(iii), 130V(1)
Security Offences (Special Measures) Act 2012, ss. 2, 3, 4(5), 13(2), First Schedule

For the applicant - Harpal Singh; M/s T Harpal & Assoc
For the respondent - Nurul Farhana Khalid; DPP

Reported by S Barathi

JUDGMENT

See Mee Chun JCA:

Introduction

[1] Enclosure 1 is a notice of motion dated 1 June 2021 filed by the applicant/accused that he be released on bail pending ongoing criminal proceedings *vide* case no WA-45SO-4-03-2021 against him. He also seeks an order that the offence under s. 124K of the Penal Code does not fall under the ambit of the Security Offences (Special Measures) Act 2012 (Act 747) (SOSMA).

The Charge

[2] The applicant was charged under s. 124K of the Penal Code and the details are as follows:

> Pada menjalankan kuasa-kuasa yang diberikan di bawah seksyen 177A(1) Kanun Tatacara Jenayah dan terletak hak pada saya menurut Seksyen 376(3) kanun yang sama, saya MUHAMAD ISKANDAR BIN AHMAD, Timbalan Pendakwa Raya, Negeri Selangor Darul Ehsan dengan ini memberi izin bagi pendakwaan terhadap:
>
> 1. Nathan a/l Rajadran (No KP: 771205-14-5285)
> 2. Lim Kian Aik (No KP: 780116-14-5519)
>
> Bagi kesalahan melakukan sabotaj dengan niat untuk mendatangkan mudarat kepada perkhidmatan air di Negeri Selangor dan merupakan satu kesalahan di bawah Seksyen 124(K) Kanun Keseksaan yang dikatakan telah dilakukan antara 2 haribulan sehingga 10 haribulan November 2020 bertempat di permis No. 32 Jalan Velox 2 Taman Velox, Rawang dalam Daerah Gombak, dalam Negeri Selangor Darul Ehsan.

[3] The charge is as follows:

> Whoever, by any means, directly or indirectly, commits sabotage shall be punished with imprisonment for life.

Submissions Of The Applicant

[4] The submissions of the applicant were that s. 13 SOSMA is unconstitutional; s. 124K of the Penal Code falls outside the ambit of SOSMA; the power to remand under s. 4(5) SOSMA is no longer in force; there are five exceptions in s. 13(2) SOSMA for which bail may be granted subject to the discretion of court; the court is vested with power to grant bail under s. 388 Criminal Procedure Code regardless of the constitutionality of s. 13 SOSMA; and the circumstances and factors to consider in allowing the applicant's bail application.

A **Submissions Of The Deputy Public Prosecutor (DPP)**

[5] It was submitted that s. 124K of the Penal Code is a security offence and unbailable under s. 13 SOSMA unless the three categories are met and it is also subject to an application by the DPP to be released on bail. Section 13 SOSMA overrides s. 388 Criminal Procedure Code. The application for
B bail ought to have been made under s. 13 SOSMA.

Analysis And Decision

[6] Although there were many issues put forth by the applicant, in particular on the constitutionality of s. 13 of SOSMA pertaining to bail, we
C felt it was not necessary to consider all of them. This is because the notice of motion as filed seeks for the release of the applicant on bail and that the offence under s. 124K of the Penal Code does not fall under SOSMA. Hence we will look at two issues as put forth by the applicant, namely that the s. 124K of the Penal Code falls outside the ambit of SOSMA and that the court
D has power to grant bail under s. 388 Criminal Procedure Code (CPC).

Whether The Offence Under Section 124K Of The Penal Code Falls Outside The Ambit Of SOSMA

[7] It cannot be gainsaid that s. 2 SOSMA prescribes its application to
E "security offences" which as per s. 3 "means the offences specified in the First Schedule". Further, the offence under s. 124K of the Penal Code being an offence under Chapter VI is an offence specified in the First Schedule. However we find that this does not *ipso facto* render s. 124K of the Penal Code as falling within the ambit of SOSMA.

F **[8]** The Court of Appeal in an earlier case of *PP v. Khairuddin Abu Hassan & Anor* [2017] 4 CLJ 701; [2017] MLRAU 90 had occasion to consider this very same issue. That case concerned an offence under s. 124L of the Penal Code which was for the offence of sabotage of banking and financial services. Our offence here is that of sabotage of water services. But nothing turns on this. This is because the element of sabotage is still there where it is defined
G in s. 130A(h)(a)(iii) of the Penal Code as an act of omission intending to cause harm to the maintenance of essential services. Section 130A(d)(a) in turn includes "water services" as essential services.

[9] In *Khairuddin*, the court noted the following at pp. 711-717 (CLJ);
H pp. 7, 8, 10 and 13 (MLRAU):

> (25) When Parliament enacted SOSMA, it adopted paras. (a), (b), (d) and (f) of cl. (1) of Art 149 of the Federal Constitution as recitals (1), (2), (3) and (4) in the preamble of SOSMA. Paragraphs (c) and (e) of cl (1) of Art 149 which pertain to races and services to the
I public, respectively, are expressly excluded in the preamble of SOSMA.

...

(27) In concluding that the charge against the respondent falls within the ambit and purview of recital or para (e) of Art 149(1) of the Federal Constitution, the learned judge took into account the definition of "sabotage" and the definition of "essential services" under s. 130A(h) of the Penal Code. We found no error in the approach taken by the learned trial judge. It is an established canon of statutory interpretation that the provisions of a law or statute must be looked at as a whole and not in isolation. ... We therefore agreed with the learned judge that the offence under s. 124L of the Penal Code for which the respondents are charged fall within Art 149(1)(e) of the Federal Constitution, namely an act "which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof".

(28) Further, we agreed with the learned judge that in determining whether the offence under s. 124L of the Penal Code is a security offence under SOSMA, the proper approach to be adopted is the purposive approach.

...

(32) The intention of Parliament as to the purpose and object of SOSMA can be seen from the following speech of the Minister in the Prime Minister's Department during the second and third reading of SOSMA Bill 2012:

...

(33) From the statements by the Minister, it is crystal clear that the purpose and objective of SOSMA is to combat terrorism.

(34) We next made reference to the internal aid namely the preamble, the scheme and the provisions of SOSMA. The preamble of SOSMA as set out above shows that SOSMA was enacted to deal with four out of the six categories of action under Art 149(1). The scheme and the provisions of SOSMA were designed to limit the fundamental liberties under Arts 5, 9, 10 and 13 of the Federal Constitution and to depart from the procedures laid down under the Criminal Procedure Code, the law which governs the conduct of criminal cases. Although SOSMA merely regulates the trial of the offences and does not create the said offences (see *PP v. Yazid Sufaat & Ors* [2014] 3 MLRA 73; [2015] 1 MLJ 571; [2014] 2 CLJ 670; [2014] 4 AMR 678), undoubtedly a person charged and tried under SOSMA will lose his liberty as he will be denied bail. In this regard, the learned judge was of the view that in interpreting SOSMA the court should be guided by the principle of giving full recognition to the fundamental rights and freedom. We found no error in the approach taken by the learned judge.

...

A (36) To reiterate, the preamble of SOSMA recites the action under paras (a), (b), (d) and (f) of cl (1) of Art 149 and not the action under paras (c) and (e) of cl (1) of Art 149 of the Federal Constitution. Whilst we found no ambiguity that SOSMA was enacted under Art 149(1)(a), (b), (d) and (f) of the Federal Constitution, we found ambiguity whether the charge against the respondents under s. 124L
B of the Penal Code was intended by Parliament to be categorised as security offences under Art 149(1) of the Federal Constitution.

...

(38) The incorporation or the presence of s. 124L in the First Schedule
C of SOSMA must not be looked at in isolation. Notwithstanding s. 124L being listed in the First Schedule of SOSMA, regard must be given to the overall scope, purpose and object of SOSMA. In our judgement, the inclusion of s. 124L in the First Schedule does little to clarify the ambiguity as s. 124L cannot change the scope, purpose and object of the enactment of SOSMA. SOSMA being a law which
D prescribes limitations on the liberty clauses must be construed religiously and any ambiguity must be resolved in favour of the respondents.

...

(43) Given that s. 124L of the Penal Code falls under cl 1 (e) of Art 149
E of the Federal Constitution and in the light of the express exclusion of para (e) of cl (1) of Art 149 of the Federal Constitution in the preamble of SOSMA, we found ambiguity whether Parliament had intended to categorize an offence under s. 124L of the Penal Code as a security offence.

F **[10]** From a reading of the above passages which we feel compelled to quote *in extenso* as it shows the comprehensive rationale of the court, it is clear that SOSMA was enacted pursuant to art. 149(1)(a), (b), (d) and (f) of the Federal Constitution. These pertained to actions to cause citizens to fear organised violence against persons, excite disaffection, to procure the alteration of law and prejudicial to public order or security. However
G art. 149(1)(e) was not recited in the preamble to SOSMA. That provision reads:

> which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof.

H **[11]** The court then found that the offence created by s. 124L of the Penal Code involved an action which fell under art. 149(1)(e) and as it had been excluded in the preamble, there was ambiguity whether Parliament had intended to categorise an offence under s. 124L of the Penal Code as a
I security offence. It also found that the presence of that section in the First Schedule must not be looked at in isolation where regard must be given to the overall scope, purpose and object of SOSMA. The purpose and objective of SOSMA was to combat terrorism.

[12] We would adopt the approach taken in *Khairuddin*. Section 124K of the Penal Code under which the applicant is charged, relates to sabotage of water services which is an essential service defined in s. 130A(d)(a) of the Penal Code. It is an action which falls under art. 149(1)(e) of the Federal Constitution "which is prejudicial to the maintenance of the functioning of any supply or service to ...". In the same vein as *Khairuddin*, when this has been excluded in the preamble, it follows that there is the same ambiguity as to whether s. 124K is intended to be categorised as a security offence notwithstanding its inclusion in the First Schedule to SOSMA.

[13] Further, the mere presence of s. 124K of the Penal Code in the First Schedule to SOSMA must be looked at in the overall scheme of the purpose and object of SOSMA which has always been to combat terrorism.

[14] We gratefully adopt the words in *Khairuddin* at p. 715 (CLJ); p. 11 (MLRAU) that:

> SOSMA being a law which prescribes limitation on the liberty clauses must be construed religiously and any ambiguity must be resolved in favour of the respondents.

[15] We thus find that s. 124K of the Penal Code does not fall within the ambit of SOSMA. It follows too that s. 13 SOSMA does not apply and it does not behove on us to make any finding on its constitutionality or otherwise. Section 388 CPC would apply in determining whether bail ought to be granted.

[16] Reference was made by the learned DPP to *PP v. Yazid Sufaat & Ors* [2014] 2 CLJ 670 at p. 676 that:

> ... By reason of s. 2 of the SOSMA, a person charged for committing a security offence will be tried according to the procedures as laid down in SOSMA. It must be noted that SOSMA merely regulates the trial of security offences. It does not create the said offences.

It was thus submitted that the provision of bail ought likewise to be governed by SOSMA, specifically s. 13(2).

[17] We take the view that *Yazid Sufaat* was concerned with the issue of whether the charges which specifically refer to terrorist acts against members of the public in Syria and not in Malaysia rendered the charges defective and bad in law such that the provisions in SOSMA could not be invoked for the trial. It was in that context that the Court of Appeal said that s. 2 of SOSMA makes it clear that the procedure laid down in SOSMA apply to the trial of any person charged with committing any security offence under Chapter VIA of the Penal Code.

[18] In any event, we have earlier found that s. 124K of the Penal Code does not fall within the ambit of SOSMA.

Power To Grant Bail Under Section 388 CPC

[19] Section 388(1) CPC provides as follow:

> (1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the Officer in charge of the Police District or by that Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:
>
> Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

The proviso states that bail may be granted to any person under 16 years, woman or sick or infirm person.

[20] Referring now to the applicant's affidavit in support in encl. 2, the reasons given as to why bail ought to be granted are that he is a citizen with no criminal record, has dependents on his wife, a daughter studying in University Selangor and a son in Form One and all of them reside together (para. 10). The applicant undertook to comply with any conditions that may be imposed by the court, that he is not a flight risk and will not be tampering with any witnesses (para. 11). He is also prepared to surrender his international passport to the court and report monthly to the investigating officer, if required (para. 12). In para. 13 he stated there is a risk to his health if his stay in prison were to be prolonged. The applicant is 44 years old.

[21] From the proviso to s. 388(1) CPC, the applicant may be allowed bail if he is "sick or infirm" as he does not fail within the other criteria. That is the threshold level. None of the reasons put forth in paras. 10 to 13 could point towards that. The closest to a health reason was there being a risk to his health where he be subjected to prolonged imprisonment. Once the threshold is met, the other factors such as flight risk or witness tampering may be considered. Under the circumstances, the applicant has not met the conditions for bail to be granted and the court is constrained to dismiss his application.

[22] Reference was made to *PP v. Dato' Balwant Singh* [2002] 4 CLJ 155 where bail was granted to a person charged with a non-bailable offence. However, in that case the accused was 81 years, afflicted with several serious diseases, to name but three, atherosclerotic heart disease, high blood pressure, severe and brittle diabetics mellitus. He also had a history of two bypass operations. At p. 169, the court stated that the standing of the accused and his age militates against the prospect of him absconding and it was unable to hold there would be tampering of witnesses.

[23] The Court of Appeal in *Raman Shunmugham lwn. PP* [2020] 2 CLJ 818 had granted bail to a person charged under s. 130V(1) Penal Code by relying on s. 13(2). The court opined that s. 13 SOSMA is akin to s. 388 CPC and that although security offences are non-bailable, there is still a discretion vested in the court to grant bail. There was a medical report to show the applicant there suffered from chronic diabetics until his left leg had to be amputated at knee level and he could only move using crutches and/or wheelchair. The court had no doubt he was a sick and handicapped person. The court also found no evidence of flight risk or witness tampering. This case illustrates no matter which section, whether s. 13(2) SOSMA or s. 388 CPC, the considerations are similar in that one looks at the health first.

[24] Similarly in *Tamil Selven Letchumenan v. PP* [2019] 1 LNS 1542, the Court of Appeal allowed bail to an accused charged under s. 130V(1) of the Penal Code due to his health condition where it was not disputed he was suffering from chronic diabetes and had one finger of his toe amputated, acute coronary syndrome and HIV positive. The court then noted the accused had promised to comply with all conditions for bail and to attend court without fail whenever his presence is required (paras. 7 to 9).

Conclusion

[25] For the above reasons, we were of the considered opinion that s. 124K of the Penal Code does not fall within the ambit of SOSMA. We further find that s. 388(1) CPC is the applicable provision on bail and that the applicant has failed to meet the conditions for bail. The application that the applicant be released on bail pending the ongoing criminal proceedings *vide* case no WA-45SO-4-03-2021 against him, was dismissed.